Supreme Court, U. S.
FILED
JUN 8 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1745

ROBERT BAGERIS and BAMBOO PRODUCTIONS, INC.,
Petitioners,

v.

LOUIS D. McGREGOR, TIMOTHY C. QUINN, and JOHN GILLIS, Judges of the Court of Appeals of the State of Michigan, MYRON H. WAHLS, Judge of the Circuit Court for the County of Wayne, JAMES M. CANHAM, Presiding Judge of the Circuit Court for the County of Wayne and JAMES R. KILLEEN, Clerk of the Circuit Court for the County of Wayne,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MERRILL, TATHAM & ROSATI
Anthony D. Rosati
Attorney for Petitioners
3000 Town Center
Suite 830
Southfield, Michigan 48075
Phone: (313) 353-2141

Interstate Brief & Record Co., 1615 Abbott St., Detroit, Michigan 48216
962-8745

INDEX

	Page
Table of Authorities	
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutory Provisions Involved	3
Statement	3
Reasons for Granting the Writ	6
A. THIS CASE IS IN DIRECT CONFLICT WITH THE UNITED STATES SUPREME COURT CASES	6
B. A SUBSTANTIAL FEDERAL QUESTION IS PRESENTED BY THE DENIAL OF DUE PROCESS OF LAW TO A LITIGANT IN A STATE ACTION	7
C. DUE PROCESS REQUIRES NOTICE AND A FULL HEARING ON AN ISSUE MATERIALLY AFFECTING THE INTEREST OF A LITIGANT	8
D. A THREE JUDGE COURT IS REQUIRED TO VINDICATE A VIOLATION OF A FEDERAL RIGHT BY THE UNCONSTITUTIONAL APPLICATION OF A STATE STATUTE	9
E. INJUNCTIVE RELIEF PROPERLY LIES WHERE THERE IS NO ADEQUATE REMEDY AT LAW AND IRREPARABLE DAMAGE WILL OCCUR IN THE STATE COURT ACTION	11
F. THE DOCTRINE OF JUDICIAL IMMUNITY DOES NOT PRECLUDE INJUNCTIVE RELIEF AGAINST JUDICIAL ACTION VIOLATIVE OF A LITIGANT'S FEDERAL RIGHTS	12

Page

Conclusion 13

Appendix A — Pertinent provisions of Statutes, Constitution & Court Rule 14

Appendix B — Judgment and Opinion of Court of Appeals for Sixth Circuit 18

Appendix C — Judgment and Opinion of District Court for the Eastern District of Michigan 20

Appendix D — Judgment and Opinion of Court of Appeals of the State of Michigan 26

TABLE OF AUTHORITIES

Cases:

Armstrong v Manzo, 380 US 545, 552, 85 S Ct 1187, 14 L Ed 2d 62 (1965) 8

George v Wayne Circuit Judge, 336 Mich 543, 58 NW2d 915 (1953) 12

Goldberg v Kelly, 397 US 254, 267, 90 S Ct 1011, 1020, 25 L Ed 2d 287 (1970) 8,9

Juidice v Vaile, _____ US _____, 97 S Ct 1211, 51 L Ed 2d 376 (1977) 6,11

Mills v State of Alabama, 384 US 214, 86 S Ct 1434, 16 L Ed 2d 484 (1966) 9

Page

Moody v Flowers, 387 US 97, 87 S Ct 1544, 18 L Ed 2d 643 (1967) 10

Pierson v Ray, 386 US 547, 87 S Ct 1213, 8 L Ed 2d 288 (1967) 13

Poresky, Ex Parte, 290 US 30, 32, 54 S Ct 3 (1933) 7

Railroad Commission of Texas v Pulman Co, 312 US 496, 61 S Ct 643, 86 L Ed 971 (1941) 12

Schroeder v City of New York, 371 US 208, 211, 83 S Ct 279, 9 L Ed 2d 255 (1962) 8

Steffel v Thompson, 415 US 452, 94 S Ct 1209, 39 L Ed 2d 505 (1974) 8,10

Virginia, Ex parte, 100 US 339, 25 L Ed 676 (1879) 13

Statutes and Other Authorities:

28 U.S.C §1254(1) 2

28 U.S.C. §§2281, 2283 and 2284 3

42 U.S.C. §1983 3

United States Constitution, Fifth and Fourteenth Amendments 3,10

MCLA 600.223, MSA 27A.223 3

GCR, 1963, 820.1(7) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No.

ROBERT BAGERIS and BAMBOO PRODUCTIONS, INC.,
Petitioners,

v.

LOUIS D. McGREGOR, TIMOTHY C. QUINN, and JOHN GILLIS, Judges of the Court of Appeals of the State of Michigan, MYRON H. WAHLS, Judge of the Circuit Court for the County of Wayne, JAMES M. CANHAM, Presiding Judge of the Circuit Court for the County of Wayne and JAMES R. KILLEEN, Clerk of the Circuit Court for the County of Wayne,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners, ROBERT BAGERIS and BAMBOO PRODUCTIONS, INC., pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above case on March 11, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is not reported, and a copy thereof is appended to this Petition in the Appendix at p. 18.

The opinion of the District Court for the Eastern District of Michigan is not reported, and a copy thereof is appended to this Petition in the Appendix at p. 20.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was made on March 11, 1977, and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

(1) Does due process require notice and an opportunity to be heard prior to an appellate court considering an issue not presented in an appeal when such consideration culminates in the grant of relief to the non-appealing party?

(2) Is the test of general, state-wide application for convening a three judge court met by a state statute and a court rule promulgated thereunder which governs appellate practice in the State of Michigan?

(3) Does the Doctrine of Judicial Immunity preclude injunctive relief against Respondent judges acting in a judicial capacity in a manner violative of Petitioner's federal right to due process of law?

(4) Where a remand order issues out of a state appellate court in violation of a federal right, and the state appellate courts refuse to grant a hearing as to such violation, is a federal court justified in dismissing a federal action to vindicate the federal right solely because the state action is still pending in a lower court proceeding on the Remand Order?

STATUTORY PROVISIONS INVOLVED

The federal statutes involved are 42 U.S.C. §1983, 28 U.S.C. §2281, 28 U.S.C. §2283 and 28 U.S.C. §2284 as is the Fifth Amendment and Fourteenth Amendment to the Constitution.

Legislative Acts of the Michigan Legislature involved are P.A. 1961, No. 236, §223, as amended by P.A. 1974, No. 297, Michigan Compiled Laws Annotated §600.223, Michigan Statutes Annotated §27A.223.

Court rules of the State of Michigan involved are General Court Rules of 1963, G.C.R. 820.1 (7).

Pertinent provisions of the above statutes, amendments and court rule are set forth in the Appendix at p. 14.

STATEMENT

Petitioners commenced this action in federal court under the Civil Rights Act alleging that their federal right to due process of law was violated during a judicial proceeding by a three judge panel of the Michigan Court of Appeals. On a successful appeal by Petitioners, Respondent Court of Appeal judges, sua sponte, pursuant to authority emanating from a state statute and a court

rule, issued a Remand Order, which for all practical purposes negated the victory of Petitioners and granted an enlargement of relief to Appellees. As Appellees had not cross-appealed or requested this relief, the issue as to the propriety of the Remand Order was not before the Court of Appeals, and consequently, Petitioners had neither notice nor an opportunity to be heard in opposition thereto.

The basic facts of the state court action are that Petitoners were Defendants in an action filed in the Circuit Court for the County of Wayne, State of Michigan, in January of 1972, wherein damages were sought for breach of a contract which by its terms was for a period of three (3) years ending December 17, 1973. The circuit court action was heard by a judge sitting without a jury in August of 1972, and the proofs submitted were directed to establishing actual and future damages for breach of the entire contract. One year later, in August of 1973, the Circuit Judge rendered his opinion holding against Petitioners and awarding damages in the amount of One Hundred Twenty-Two Thousand Eleven and 87/100 ($122,011.87) Dollars which consisted of actual damages in the amount of Forty-Seven Thousand Eleven and 87/100 ($47,011.87) Dollars and future damages in the amount of Seventy-Five Thousand ($75,000.00) Dollars. Petitioners appealed this judgment to the Court of Appeals of the State of Michigan, and the Plaintiffs in that action did not take a cross-appeal. The Court of Appeals rendered its decision on February 26, 1975, as amended April 7, 1975, reversing the award of future damages as being too speculative and not supported by the record. The Court of Appeals, however, then, did sua sponte remand the cause back to the Circuit Court for the County of Wayne as follows:

> "Remanded for proof of damages, if any, sustained by Plaintiff between the dates of the conclusion of trial, September 1, 1972, and December 16, 1973 arising from Defendants breach of Exhibits 1 and 2."

The issue of the grant of relief to the non-appealing party in the event Petitioners prevailed was not before the Court of Appeals, and consequently, Petitioners had neither notice nor an opportunity to be heard as to that issue in violation of their federal right to due process. This action materially affected Petitioners' interest in that on remand they are subject to the possibility of an award of damages far in excess of the amount originally erroneously awarded by the Circuit Judge.

Petitioners' attempts to secure a hearing on this issue in the state courts was to no avail as the Court of Appeals denied Petitioners' Motion for Rehearing and the Supreme Court of Michigan denied Application for Leave to Appeal and a Motion for Reconsideration of said denial.

Following the exhaustion of the state remedies without securing a hearing on the issue of the violation of Petitioners' federal right to due process, Petitioners initiated the within action. The relief sought in Federal Court was the convening of a three judge court to declare the pertinent state statutes and court rule unconstitutional as applied to Petitioners and injunctive relief to enjoin pending state judicial action enforcing the Remand Order.

The District Court entered an opinion and order on May 19, 1976 granting Respondents' Motion to Dismiss for the following reasons:

> "A. Petitioners failed to present a substantial Federal question;

B. A three judge court need not be convened as the pertinent statute and court rule were not of a 'statewide application';

C. That Petitioners could raise the federal question in the pending action in the Circuit Court for the County of Wayne, State of Michigan, and consequently there is no threatened irreparable damages and inadequacy of legal remedies to justify the issuance of an injunction;

D. That the Doctrine of Judicial Immunity precludes maintenance of this action."

On March 11, 1977 the Court of Appeals affirmed the decision of the District Court for the reasons set forth in the opinion and order of the District Judge.

REASONS FOR GRANTING THE WRIT

A. THIS CASE IS IN DIRECT CONFLICT WITH THE UNITED STATES SUPREME COURT CASES.

The case below should be reviewed because it is in conflict with the decisions of this Court sanctioning enforcement of federal rights by federal courts where state courts decline to act. Review is also necessary in view of the developing attitude of this Court reflected by *Juidice* v *Vaile*, US , 97 S Ct 1211, 51 L Ed 2d 376 (1977), encouraging resolution of federal rights in pending state actions. There can be no question but that in the case at bar Petitioners have been rejected by the state courts in their efforts to enforce their federal rights,

and even assuming the correctness of the decision of the court below that Petitioners can raise this federal question in the Circuit Court for the County of Wayne, there are serious questions as to the effectiveness of such a hearing where the eventual outcome of the hearing would be a reversal by the lower court of the Order of a higher court directed to said lower court.

B. A SUBSTANTIAL FEDERAL QUESTION IS PRESENTED BY THE DENIAL OF DUE PROCESS OF LAW TO A LITIGANT IN A STATE ACTION.

The existence of a substantial question of constitutionality must be determined by the allegations of the Bill of Complaint. The question may be plainly unsubstantial, either because it is "obviously without merit" or because "its unsoundness so clearly results from the precious decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy". *Ex Parte Poresky*, 290 US 30, 32, 54 S Ct 3 (1933). Neither of the elements of unsubstantiality exist in the instant matter.

The federal question involved in the instant matter is an alleged violation of Petitioners' federal right to due process of law. The violation occurred by virtue of judicial action taken at the appellate level. The issuance of a Remand Order by the Court of Appeals on an issue not raised in the appeal deprived Petitioners of notice and an opportunity to be heard. Notice and an opportunity to be heard are essential and fundamental requirements of due process of law.

There can be no question but that Petitioners Complaint alleges a cause of action by virtue of state action which deprived them of their constitutional right to due process of law. The violation occurred by virtue of the denial of notice and the opportunity to be heard and not by the fact that the Remand Order itself is contrary to the laws of the State of Michigan. The deprivation of one's federal constitutional right to due process of law raises a substantial federal question. While it is true that only the rights of a solitary individual are involved in the instant matter, this Court has held that the unconstitutional deprivation of a solitary individual's rights is no less deserving of redress than a constitutional deprivation affecting the rights of many. *Steffel* v *Thompson*, 415 US 452, 94 S Ct 1209, 39 L Ed 2d 505 (1974).

C. DUE PROCESS REQUIRES NOTICE AND A FULL HEARING ON AN ISSUE MATERIALLY AFFECTING THE INTEREST OF A LITIGANT.

The courts below categorized the action of the Court of Appeals as simply denying Petitioners a prior opportunity to object. It is respectfully submitted that the concept of due process of law is far more encompassing. Elementary and fundamental requirements of due process are notice, *Schroeder* v *City of New York*, 371 US 208, 211, 83 S Ct 279, 9 L Ed 2d 255 (1962); the right to be heard, *Goldberg* v *Kelly*, 397 US 254, 267, 90 S Ct 1011, 1020, 25 L Ed 2d 287 (1970); and the opportunity to be heard at a meaningful time in a meaningful manner, *Armstrong* v *Manzo*, 380 US 545, 552, 85 S Ct 1187, 14 L Ed 2d 62 (1965).

The due process requirements of a hearing involve the right to present arguments and evidence, *Goldberg* v *Kelly*, 397 US at 267, 90 S Ct at 1020; and a decision based solely on the legal rules and evidence adduced at the hearing, *Goldberg* v *Kelly*, 397 US at 267, 90 S Ct at 1020. None of the essential and fundamental requisites of due process of law were afforded Petitioners prior to the rendition of the Remand Order. The action of the Court of Appeals clearly deprived Petitioners of their federal right to due process of law.

The courts below correctly concluded that the Remand Order in and of itself does not deprive Petitioners of property. It is Petitioners' contention, however, that by the express directions of the Remand Order an award of damages is inevitable. Where the conclusion of state action is reasonably predictable and violative of a federal right, a federal court need not wait for the inevitable to happen before exercising its jurisdiction to protect the federal right. *Mills* v *State of Alabama*, 384 US 214, 86 S Ct 1434, 16 L Ed 2d 484 (1966).

D. A THREE JUDGE COURT IS REQUIRED TO VINDICATE A VIOLATION OF A FEDERAL RIGHT BY THE UNCONSTITUTIONAL APPLICATION OF A STATE STATUTE.

The courts below erred in holding that a three judge court need not be convened as the statute in question and the court rule promulgated thereunder were not of general, state-wide application. The Court of Appeals of the State of Michigan is a branch of state government.

performs a state function and has state-wide jurisdiction. The statute and court rule in question establish perimeters of judicial authority applicable state-wide, irrespective of the residency or domicile of the litigants. A statute is not of general state-wide application if it deals solely with purely local matters of a local governmental unit. *Moody* v *Flowers*, 387 US 97, 87 S Ct 1544, 18 L Ed 2d 643 (1967). This is certainly not the situation in the instant matter.

The courts below further erred in holding that a three judge court is not required for the reason that a Remand Order was permitted, rather than compelled, by state statute. In *Steffel* v *Thompson, supra*, the court dealt with a criminal trespass statute, valid on its face, which was applied in violation of Petitioner's First and Fourteenth Amendment rights. Obviously, the unconstitutional application of a statute valid on its face is not compelled by the statute. The gist of the action is the unconstitutional application and not whether the proper action was compelled or permitted. The relief sought is redress of the unconstitutional deprivation which is the objective of the within action by Petitioners, and a three judge court is required to dispense full and complete relief.

The case at bar illustrates a perfect situation for retention of federal jurisdiction pending state court action. All doubt as to whether the Wayne County Circuit Court can or will grant Petitioners a hearing on the federal question will be resolved at the time of the hearing on the Remand Order. If the Wayne County Circuit Court refuses to pass on the federal question and assesses monetary damages against Petitioners, an injunction can issue staying further state court proceedings until the federal question is heard in Federal Court.

In view of the prior refusal of the higher courts of the State of Michigan to grant Petitioners a hearing on the federal question and the uncertainty as to whether the Circuit Court can now grant such a hearing, the retention of jurisdiction by the courts below would not violate the dictate of *Juidice* v *Vaile*, US , 97 S Ct 1211, 51 L Ed 2d 376 (1977), advocating enforcement of federal rights in pending state actions. *Juidice* presupposes that a hearing on the federal questions is available in the state courts and certainly in a situation such as the case at bar, where there is a strong indication that such a hearing cannot be had, the federal court should retain jurisdiction.

E. INJUNCTIVE RELIEF PROPERLY LIES WHERE THERE IS NO ADEQUATE REMEDY AT LAW AND IRREPARABLE DAMAGE WILL OCCUR IN THE STATE COURT ACTION.

Petitioners seek injunctive relief for the reason that they have no adequate remedy at law in the state courts to redress the deprivation of their federal right to due process of law. Where the unconstitutional deprivation occurs at the appellate level, the right to a hearing, or appeal, is a matter of grace, and not right, under the laws of the State of Michigan. Petitioners sought a hearing in both the Court of Appeals and Supreme Court of the State of Michigan to no avail. At this juncture, Petitioners have exhausted their state remedies without receiving a hearing on the federal questions involved.

The courts below opined that Petitioners will have the opportunity to raise the federal question during the hearing in Circuit Court on the Remand Order. This opinion totally ignores reality as Petitioners objective in seeking a hearing is to attack the validity of the Remand Order. The law in Michigan, however, is well settled that upon Remand by an appellate court, the trial court is without power to do otherwise and follow the directions of the Remand Order. *George* v *Wayne Circuit Judge*, 336 Mich 543, 58 NW2d 915 (1953). It necessarily follows that the Circuit Court is without jurisdiction to grant a hearing, much less an order, to determine the validity of, or set aside the Remand Order of the Court of Appeals. If this is so, Petitioners' contention that the inevitable result of the Remand hearing will be an award of damages against Petitioners, the only defense to such an outcome is enjoining the state court proceeding.

Where there is a reasonably predictable state court action violative of a federal right, the courts below, at the very least, should have retained jurisdiction pending such state action under the doctrine of abstention. *Railroad Commission of Texas* v *Pulman Co.*, 312 US 496, 61 S Ct 643, 86 L Ed 471 (1941).

F. THE DOCTRINE OF JUDICIAL IMMUNITY DOES NOT PRECLUDE INJUNCTIVE RELIEF AGAINST JUDICIAL ACTION VIOLATIVE OF A LITIGANT'S FEDERAL RIGHTS.

The law is well settled that the Civil Rights Act is intended to prohibit unlawful state action depriving one of his federal constitutional rights, whether the state

action be that of the executive, legislative or judicial branch, *Ex Parte Virginia*, 100 US 339, 25 L Ed 676 (1879). There is no dispute with the proposition of law that the Civil Rights Act does not abrogate the Doctrine of Judicial Immunity where damages are sought. *Pierson* v *Ray*, 386 US 547, 87 S Ct 1213, 8 L Ed 2d 288 (1967). But if there is truly relief under the Civil Rights Act against judicial action violative of a person's federal constitutional rights, and damages are not awardable as a deterrent, it would seem that the only available remedy is that of injunctive relief. If this is not so, we have the ludicrous situation that our judiciary, which is the branch of government charged with guarding the constitutional rights of the citizens, is immune from constitutional restraint and free to deprive a person of his federal constitutional rights.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinions of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

MERRILL, TATHAM & ROSATI

/s/ Anthony D. Rosati
3000 Town Center
Suite 830
Southfield, MI 48075
(313) 353-2141

Dated: June 6, 1977

APPENDIX A

Federal Statutes Involved

42 USC §1983

§1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

R.S. §1979.

28 USC §2281

28 §2281 THREE-JUDGE COURTS Ch. 155

§2281 Injunction against enforcement of State statute; three-judge court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. June 25, 1948, c. 646, 62 Stat. 968.

28 USC §2283

§2283. Stay of State court proceedings

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments. June 25, 1948, c. 646, 62 Stat. 968.

28 USC §2284

§2284. Three-judge district court; composition; procedure

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State. June 25, 1948, c. 646, 62 Stat. 968; June 11, 1960, Pub.L. 86-507, §1(19) 74 Stat. 201.

U.S. Constitution

AMENDMENT [V.]

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV.

§1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

State Statute Involved,
MCLA 600.223, MSA 27A.223

600.223 Rule-making power

Sec. 223. The supreme court has authority to promulgate and amend general rules governing practices and procedure in the supreme court and all other courts of record, including but not limited to authority:

* * *

(2) to prescribe the practices and procedure in the supreme court and other courts of record concerning:

(a) methods of review,

(b) special verdicts,

(c) the granting of new trials,

(d) motions in arrest of judgment,

(e) taxation of costs,

(f) giving notice of special motions and other proceedings,

(g) the stayings of proceedings,

(h) hearing of motions,

(i) imposing of terms on motions granted,

(j) discovery procedure, and

(k) other matters at its discretion.

* * *

Amended by P.A. 1974, No. 297, §1, Eff. April 1, 1975.

State Court Rule Involved,
GCR 1963 820.1(7)

Rule 820 Miscellaneous Relief Obtainable in Court of Appeals.

.1 Relief Obtainable. The Court of Appeals may, at any time, in addition to its general powers, in its discretion and on such terms as it deems just:

> (7) Give any judgment and make any order which ought to have been given or made, and make such other and further orders and grant such relief, as the case may require;

EXHIBIT B

ORDER

(United States Court of Appeals
For the Sixth Circuit)

(Bageris et al v McGregor, et al)

(No. 76-1978)

(Filed March 11, 1977)

Before: Edwards, Celebrezze and Engel, Circuit Judges.

This appeal has been referred to a panel of the Court pursuant to Rule 3 (e) of the Sixth Circuit.

Appellants initiated action in the Eastern District of Michigan against three Judges of the Michigan Court of Appeals and two Judges of the Circuit Court of Wayne County, Michigan seeking injunctive and declaratory relief under 42 U.S.C. §1983, alleging that the Michigan

statute and court rule authorizing appellees' actions are unconstitutional as applied to the appellants. The appellants further request the convening of a three-judge court pursuant to 28 U.S.C. §2283. On May 19, 1976, the District Court granted appellees' motion to dismiss. Appellants appeal from that decision.

Upon due consideration of the briefs and record before this Court, we are of the opinion that the judgment of the District Court should be affirmed.

Therefore, it is ORDERED that the judgment of the District Court be and it is hereby affirmed for the reasons set forth in Judge Cornelia G. Kennedy's Opinion and Order.

ENTERED BY ORDER OF THE COURT
John P. Hehman
Clerk

EXHIBIT C

JUDGMENT DISMISSING ACTION

(United States District Court
Eastern District of Michigan
Southern Division)

(Bageris et al v McGregor, et al)

(Civil Action No. 75-72486)

(May 19, 1976)

In accordance with the Opinion and Order Granting Defendants' Motion to Dismiss, filed and entered this date, this civil action No. 75-72486 IS HEREBY DISMISSED.

Dated: May 19, 1976 /s/ CORNELIA G. KENNEDY
Detroit, Mich. United States District Judge

OPINION AND ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

(United States District Court
Eastern District of Michigan
Southern Division)

(Bageris et al v McGregor, et al.)

(Civil Action No. 75-72486)

(Dated May 19, 1976)

On January 19, 1972 Steven Glantz and Gabriel Glantz filed suit in the Wayne County Circuit Court against Robert Bageris and Bamboo Productions, Inc., plaintiffs in the instant case, alleging breach of a partnership agreement. On August 30, 1973 the trial judge found in favor of the Glantzes and awarded actual damages of $47,001.87 and future damages of $75,000.00. Bageris and Bamboo appealed to the Michigan Court of Appeals, alleging *inter alia* that future damages could not be awarded since they were too speculative and uncertain; the Glantzes did not cross-appeal. On February 26, 1975 a panel of the Michigan Court of Appeals composed of Louis D. McGregor, Timothy C. Quinn, and John Gillis affirmed the award of actual damages, reversed the award of future damages, and remanded the case "for proof of damages, if any, sustained by plaintiffs between the date of judgment and December 16, 1973 arising from defendants' breach . . . ." This order was later corrected to permit proof of damages between the date of conclusion of the trial and December 16, 1973.

Bageris and Bamboo then filed a motion for rehearing, raising the same issue they seek to present in the instant case — that the remand order was illegal because it gave

the Glantzes "a second opportunity to prove the issue of future damages" (Complaint, paragraph 27) even though they had not cross-appealed, and because Bageris and Bamboo had not been given notice or an opportunity to be heard as to the propriety of such relief. Rehearing was denied, as was a subsequent application for leave to appeal to the Michigan Supreme Court. On December 18, 1975 Bageris and Bamboo filed the instant case against the three judges of the Court of Appeals panel; the presiding judge and the clerk of the Wayne County Circuit Court; and the trial judge of that court assigned to carry out the remand order.

Plaintiffs allege a cause of action based on 42 U.S.C. §1983, claiming that their rights under the Fifth and Fourteenth Amendments to the United States Constitution are at stake. Plaintiffs pray for a preliminary injunction against enforcement of the Michigan Court of Appeals' remand order and a declaratory judgment that the Michigan statute and court rule authorizing such remands are unconstitutional as applied to plaintiffs. Defendants have filed a motion to dismiss which is now before the Court for decision.

It should be noted that plaintiffs also request the convening of a three judge court pursuant to 28 U.S.C. §2283. However, a three judge court is required only where plaintiff seeks to enjoin a state statute of general, state-wide application. *Moody v. Flowers*, 387 U.S. 97 (1967). Since plaintiffs here claim only that the remand order was permitted by a state statute, rather than compelled, a three judge court is not required. *Griffin v. Prince Edward County School Board*, 377 U.S. 218 (1964); *Ex Parte Public National Bank*, 278 U.S. 101 (1928). Moreover, in light of the Court's decision *infra*

that no substantial federal question is presented, the doctrine of *Ex Parte Poresky*, 290 U.S. 30 (1933), obviates the need for a three judge court.

28 U.S.C. §2283 provides that federal courts may not enjoin proceedings in a state court "except as expressly authorized by Act of Congress . . . ." The Supreme Court has held that 42 U.S.C §1983 is such an express, Congressional authorization. *Mitchum v. Foster*, 407 U.S. 225 (1972). Hence, §2283 does not bar an injunction in the instant case.

The essence of plaintiffs' claim is stated in their Memorandum In Support Of Restraining Order And Preliminary Injunction at page 4:

> As GLANTZ did not take a cross-appeal, the issue as to the right to the relief afforded by the remand order was not before the Court of Appeals for consideration. BAGERIS had no notice from the pleadings that this issue was a matter of consideration by the Court of Appeals. Nor could BAGERIS anticipate such an order in view of the well settled law of the State of Michigan, which precludes the grant of such relief. The remand provision apparently issued pursuant to power granted the Court of Appeals under GCR 1963, 820.1 (7), which provides as follows:
>
> "The Court of Appeals may, at any time, in addition to its general power, in its discretion and on such terms as it deems just:
>
> (7) give any judgment and make any order which ought to have been given or made, and make such other and further orders and grant such relief as the case may require."

> It is BAGERIS' contention that the application of GCR 820.1 (7) in the instant matter deprived him of his constitutional right to due process under the Michigan Constitution of 1963, Article 1, Section 17 and the United States Constitution, Amendment 5 and Amendment 14 for the reason that BAGERIS was denied notice and an opportunity to be heard on an issue materially affecting his interest.

It is difficult to understand how the Michigan Court of Appeals' action can be said to violate the federal Constitution. Plaintiffs refer to the practice of denying relief to parties who fail to cross-appeal as "the well settled law of the State of Michigan" in apparent recognition of the fact that no federal guarantee exists for such a rule of procedure. While plaintiffs complain that the effect of the remand order is to create a second opportunity for the Glantzes to prove their "future" damages, it can hardly be contended that the Fourteenth Amendment prevents Michigan from permitting plaintiffs who have recovered actual damages as of the date of trial to subsequently recover for damages accruing thereafter, either on remand or pursuant to a separate action.

The allegation that the remand order somehow deprives plaintiffs of due process fails to withstand analysis. While it is apparently true that the remand order was issued without according plaintiffs a prior opportunity to object, plaintiffs have not suffered any loss of property thereby. The result of the hearings on remand may be a further monetary judgment against plaintiffs — a deprivation of property — but by that point in time plaintiffs will

presumably have had both notice and an opportunity to be heard on all the issues, state and federal, which they urge now; an appeal will be available to the Michigan Court of Appeals, as will be discretionary review by the Michigan Supreme Court and a right of appeal to the Supreme Court of the United States as to any issue of federal law decided adversely to plaintiffs' claim. 28 U.S.C. §1257.

The mere fact that plaintiffs may be put to additional litigation expense by virtue of the hearings on remand does not constitute a deprivation of "property" within the meaning of the Fourteenth Amendment. cf. *Douglas v. City of Jeannette*, 319 U.S. 157 (1943) and *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975). Since no such property interest is at stake, it is even doubtful whether the complaint here reveals a "case or controversy" within the meaning of Article III of the federal Constitution, thus far, plaintiffs have suffered no demonstrable injury as a result of the remand order.

Threatened irreparable damages and inadequacy of legal remedies are traditional prerequisites to equitable relief which are applicable to suits for injunctions based on §1983. *Boyle v. Landry*, 401 U.S. 77 (1971); *Allee v. Medrano*, 416 U.S. 802, 814 (1974). Here, there is no indication that plaintiffs' federal claims will not be adequately considered by the Wayne County Circuit Court in its hearings on remand. Remitting plaintiffs to that forum to pursue their claims here as defenses there works no irreparable injury, particularly in light of the fact that plaintiffs can appeal an adverse decision on their federal claims to the United States Supreme Court.

Finally, since all of the defendants are judges or court officials, this suit is barred by the doctrine of judicial immunity. *Pierson v. Ray*, 386 U.S. 547 (1967); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872). While the cited cases involved suits for *damages* only against judicial officers, the Sixth Circuit Court of Appeals has recently held that a §1983 suit seeking both damages and injunctive relief was also barred by judicial immunity. *Littleton v. Fisher*, No. 75-1424 (February 13, 1976).

The fact that plaintiffs seek a declaratory judgment does not alter any of the foregoing considerations. The declaratory judgment remedy is discretionary. *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967); *Toilet Goods Assn. v. Gardner*, 387 U.S. 158 (1967). Here, where plaintiffs have shown no need for equitable relief and where its use would interfere with ongoing state court proceedings, a declaratory judgment would be singularly inappropriate. cf. *Huffman*, supra, 420 U.S. at 603-04.

Accordingly, defendants' motion to dismiss is granted and a judgment of dismissal will be entered.

/s/ CORNELIA G. KENNEDY
United States District Judge

Dated: May 19, 1976
Detroit, Mich.

EXHIBIT D

CORRECTED OPINION

(State of Michigan in the Court of Appeals
Division I)

(No. 18762)

(Filed April 17, 1975)

Steven Glantz and Gabriel Glantz, jointly, Plaintiff-Appellees vs. Robert Bageris, a/k/a Bob Bageris Productions and Bob Bageris Productions Inc., a Michigan corporation, and Bamboo Productions, Inc., a Michigan corporation, jointly and severally, Defendants-Cross-Plaintiffs Appellants vs Steven Glantz and Gabriel Glantz, jointly, Cross-Defendants-Appellees

BEFORE: McGregor, PJ; Gillis and Quinn, JJ.

Pursuant to the March 17, 1975 order of this Court which granted plaintiffs' motion to correct opinion, the next to the last sentence of that opinion is corrected and amended to read as follows:

> "Remanded for proof of damages, if any, sustained by plaintiffs between the date of the conclusion of trial, September 1, 1972, and December 16, 1973 arising from defendants' breach of exhibits 1 and 2."

OPINION

(State of Michigan in the Court of Appeals
Division I)

(Steven Glantz, et al, v. Bageris, et al., v. Glantz et al.)

(Filed February 26, 1975)

BEFORE: McGregor, PJ; Gillis and Quinn, JJ.

PER CURIAM.

This action for breach of contract was tried by the court without a jury and resulted in a judgment for plaintiffs. Defendants' motion for new trial was denied and they appeal. Defendant Bageris cross-appeals from the dismissal of his cross-complaint.

December 17, 1970, plaintiffs and defendant Bageris executed exhibit 1, attached to this opinion. December 23, 1971, the same parties executed exhibit 2, also attached. After extensive findings of fact, the trial judge concluded:

> "(A) The agreements entered into constituted valid contracts, but not a partnership.
>
> (B) That defendant Bageris violated these contracts without legal cause or justification.
>
> (C) That the plaintiffs were not guilty of any impropriety or breach of contract."

Our review of the record establishes that the findings of fact by the trial judge are not clearly erroneous, GCR

1963, 517.1. Those findings support the conclusions of law, *supra*. The record further supports the trial court's computation of damages in the amount of $47,011.87.

However, the trial judge went further and awarded plaintiffs $75,000 for loss of future profits. We find this award speculative and not supported by the record. The $75,000 award is reversed. However, the agreements have expired by their own terms, and any actual loss to plaintiffs accruing between the date of the judgment and December 16, 1973 is now subject to proof.

The trial judge also made findings of fact with respect to the cross-complaint. The record does not establish these findings to be clearly erroneous, and they support the dismissal of the cross-complaint.

Affirmed except as to the damage award of $75,000 for loss of future profits. That award is reversed. Remanded for proof of damages, if any, sustained by plaintiffs between the date of the judgment and December 16, 1973 arising from defendants' breach of exhibits 1 and 2. Neither side having prevailed in full, no costs are awarded.

PARTNERSHIP AGREEMENT

THIS AGREEMENT, made and concluded this 17th day of December, 1970, by and between ROBERT BAGERIS, (hereinafter called BAGERIS) and GABRIEL GLANTZ and STEVEN J. GLANTZ, (hereinafter collectively called GLANTZ).

WITNESSETH:

BAGERIS and GLANTZ are shareholders, officers and Directors of EASTOWN THEATER, INC., a Michigan corporation, engaged in the business of presenting live musical entertainment at the Eastown Theater located at 8041 Harper, Detroit, Michigan; and

BAGERIS and GLANTZ ~~have,~~ in addition to said corporate activity, will engage in the business of presenting live musical entertainment in their personal capacity on a partnership basis; and

It is now the desire of the parties to set forth the basis of their partnership.

NOW THEREFORE, in consideration of the premises and the covenants hereinafter contained, the parties hereto agree as follows:

1. That those certain agreements between the parties dated January 19, 1970, and as amended January 20, 1970, and Paragraph Seven (7) of the May 19, 1970 agreement, insofar as they establish partnership rights, shall be null and void and the partnership rights of the parties shall be as hereinafter set forth.

2. That in addition to the activities of their corporation, EASTOWN THEATER, INC., BAGERIS and GLANTZ, may from time to time, engage in the business of presenting live musical entertainment.

3. That the presentation, or involvement in the presentation, of live musical entertainment by either BAGERIS or GLANTZ, whether as a partner, joint ventures, stockholder or in an individual capacity, shall be partnership activity in which each of the partners is to participate fully, or to the extent of the interest of the other party, as hereinafter set forth.

a. BAGERIS and GLANTZ shall have a fifty (50%) per cent interest in partnership activity of the other party within the City of Detroit or within a thirty (30) mile radius of the City-County Building located in the City of Detroit, except partnership activity conducted at Walled Lake, which shall be governed by Paragraph Three b (3b) hereof.

b. BAGERIS and GLANTZ shall have a twenty-five (25%) per cent interest in partnership activity originated and carried out by the other party outside of the thirty (30) mile radius of the City-County Building in the City of Detroit.

c. STEVEN J. GLANTZ and GABRIEL GLANTZ shall be jointly and severally liable to the extent of the partnership interest of GLANTZ hereunder.

4. That in the event the Grande BallRoom or Walled Lake Amusement Park is used to conduct said partnership activity, GLANTZ shall receive the sum of ONE HUNDRED TWENTY-FIVE ($125.00) DOLLARS for each performance as rental for said premises, which does not include other operational expenses.

5. That STEVEN J. GLANTZ has not reached the age of majority and GABRIEL GLANTZ, his father, covenants and agrees with BAGERIS to indemnify and reimburse him to the extent of any claims, demands or causes of action BAGERIS may have arising out of STEVEN J. GLANTZ' breach of the terms of this Agreement and GABRIEL GLANTZ further agrees to pay and advance any sums required of STEVEN J. GLANTZ as his share of deposits or advance expense required in conducting the business activity contemplated herein.

6. That BAGERIS has presently arranged for a live musical presentation of the Grand Funk Railroad at Cincinnati, Ohio, on December 26, 1970, and agrees that GLANTZ shall participate therein on an equal partnership basis.

7. That the term of this Agreement shall be for a period of three (3) years from the date of execution.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the day and year first above written.

/s/ Robert Bageris

/s/ Gabriel Glantz

/s/ Steven J. Glantz

WITNESSES:

(illegible)
(illegible)

"Amendment to Partnership Agreement of 12/17/70

(1) Until July 1, 1972 — Each party may participate to the extent of 50% of entire show of the other party within 30 mile radius of Detroit. Either party may sell or assign a portion of his share to a 3rd party; but this shall not affect the 50% share of the other.

(2) After July 1, 1972 — Each party may participate to the extent of 40% of entire show of the other party within 30 mile radius of Detroit. Either party may sell or assign a portion of his share to a 3rd party, but this shall not affect the share of the other.

(3) Parties shall participate on a 50-50 basis for shows at Grande Ballroom and Walled Lake Palladium.

(i) New Year show at Grande at 1000.00 rental which includes clean-up.

(ii) Rent at Grande Ballroom & Walled Lake shall be as set forth in Agreement.

(4) Grande Ballroom shall not be leased to rock groups, similar to shows of Eastown, on Friday and/or Saturday night, except rock groups oriented toward the blacks.

(5) Each party must give written notice to other party of contemplated shows within 5 days after deposit on hall & other party must indicate in writing election to participate or not within 10 days thereafter.

(6) Each party releases the other from any and all obligations for shows promoted outside of Detroit prior to the date of the amendment.

(7) Other than as amended herein, agreement of 12/17/70 is hereby reaffirmed and ratified.

/s/ Robert P. Bageris

/s/ Gabriel Glantz

/s/ Steven J. Glantz

Dec. 23, 1971

Supreme Court, U. S.
FILED
JUL 8 1977
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

No. 76-1745

ROBERT BAGERIS, et al,

Petitioners,

v

LOUIS D. McGREGOR, et al,

Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS LOUIS D. McGREGOR, TIMOTHY C. QUINN AND JOHN GILLIS IN OPPOSITION

FRANK J. KELLEY
Attorney General

Robert A. Derengoski
Solicitor General

Thomas L. Casey
Assistant Attorney General

Business Address:
525 West Ottawa Street
761 Law Building
Lansing, Michigan 48913
(517) 373-1124

PRINTED BY SPEAKER-HINES AND THOMAS, INC., LANSING, MICHIGAN—1977

TABLE OF CONTENTS

Index of Authorities ii

Opinions Below 1

Jurisdiction 2

Question Presented 2

Statutes and Court Rules Involved 2

Statement of the Case 3

Argument

The Decision Of The Courts Below Was Clearly Correct And This Case Presents No Important Questions Of Federal Law Which Must Be Settled By This Court 5

I. The Dismissal Of Petitioners' Civil Rights Action Was Correct Because The Complaint Raised No Substantial Federal Questions .. 5

II. The Remand Order Of The Michigan Court Of Appeals Did Not Deprive Petitioners Of Due Process Of Law 8

III. The Courts Below Correctly Concluded That The Respondents Are Protected By The Doctrine Of Judicial Immunity 10

Conclusion 11

INDEX OF AUTHORITIES

Cases Cited

Bailey v Patterson, 369 US 31 (1962) 5

Devine v Patteson, 242 F2d 828 (CA 6, 1957) cert den 355 US 821 (1957) 6

Ex parte Poresky, 290 US 30, 31-32 (1933) 5, 8

Gasoline Products Co v Champlin Refining Co, 283 US 494 (1931) 6

Goldberg v Kelley, 397 US 254, 263 (1970) 9

Littleton v Fisher, 530 F2d 691 (CA 6, 1976) 10

Norfolk Southern Railroad Co v Ferebee, 238 US 269 (1915) 6

Pierson v Ray, 386 US 547 (1967) 10

Rich v Daily Creamery Co, 296 Mich 270 (1941) ...6, 7, 8

Rich v Daily Creamery Co, 303 Mich 344 (1942) 7

Sullivan v Ulrich, 326 Mich 218 (1949) 7

Annotation: "Propriety of Limiting to Issue of Damages Alone New Trial Granted on the Ground of Inadequacy of Damages Awarded," 29 ALR2d 1199 (1953) 7

Annotation: "New Trial on Questions of Damages Only," 75 L Ed 1191, 1192 (1931) 6

Civil Rights Act, 42 USC § 1983 .....2, 4, 10

GCR 1963, 810(1) 2, 7, 8

28 USC § 2283 4

MCLA 600.310; MSA 27A.310 .....2, 7, 8

In The

SUPREME COURT OF THE UNITED STATES

No. 76-1745

ROBERT BAGERIS, et al,

Petitioners,

v

LOUIS D. McGREGOR, et al,

Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS LOUIS D. McGREGOR, TIMOTHY C. QUINN AND JOHN GILLIS IN OPPOSITION

OPINIONS BELOW

The unreported Opinion and Corrected Opinion of the Michigan Court of Appeals are reprinted at pages 26-28 of the Petition for a Writ of Certiorari. The unreported Opinion and Order of the United States District Court for the Eastern District of Michigan dismissing Plaintiff's civil rights action is reprinted at pages 20-25 of the Petition. The unreported Order of the United States Court of Appeals for the Sixth Circuit affirming the judgment of the District Court is reprinted at pages 18-19 of the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition for Writ of Certiorari.

QUESTION PRESENTED

Does a complaint which merely indicates dissatisfaction with an order from an intermediate State appellate court reversing a portion of a contract damages award and remanding the case for additional proofs on the element of damages, if any, state a claim upon which relief can be granted under the Civil Rights Act, 42 USC § 1983?

STATUTES AND COURT RULES INVOLVED

In addition to the constitutional provisions, statutes and court rules quoted on pages 14-18 of the Petition, this case involves the following statute and court rule:

MCLA 600.310; MSA 27A.310:

> "The Court of Appeals has original jurisdiction to issue prerogative and remedial writs or orders as provided by rules of the Supreme Court, and has authority to issue any writs, directives and mandates that it judges necessary and expedient to effectuate its determination of cases brought before it."

Michigan General Court Rules 1963, 810(1):

> "Review of issue tried without a jury. (1) Upon appeal to the Court of Appeals from a judgment involving an issue tried without a jury, such judgment may be affirmed or reversed, the cause remanded with directions, or a new trial ordered."

STATEMENT OF THE CASE

On December 17, 1970, the Petitioners entered into a partnership agreement with Gabriel Glantz and Steven J. Glantz, and on December 23, 1971, an amendment to this agreement was executed. (Copies of these documents are reproduced at pages 28-32 of the Petition.) The term of the contract was for a period of three years, until December 16, 1973. On January 19, 1972, Steven and Gabriel Glantz filed suit in the Circuit Court of Wayne County, Michigan, against Petitioners alleging breach of the partnership agreement. On August 30, 1973, a trial judge found that Bageris had breached the contract and the Glantzes were awarded actual damages of $47,011.87 and future damages of $75,000. The Petitioners appealed to the Michigan Court of Appeals alleging, *inter alia,* that future damages could not be awarded since they were too speculative and uncertain. No cross appeal was taken by the Glantzes.

On February 26, 1975, a panel of the Michigan Court of Appeals composed of the Respondents, Louis D. McGregor, Timothy C. Quinn and John H. Gillis upheld the findings of fact and conclusions of law of the trial judge as to the liability of the instant Plaintiffs for breach of the contracts. The computation of actual damages was affirmed, but because the trial court's computation of the amount of future damages had been made before the contracts had expired, the Court of Appeals found that computation to be "speculative and not supported by the record" and the award of $75,000 was reversed. By the time the Michigan Court of Appeals had decided the case however, the contracts had expired by their own terms and since speculation was thus no longer required in order to accurately compute damages, the case

was remanded to the trial court for proof of damages, if any, sustained by the Glantzes, between the date of the trial court judgment and the date of expiration of the contracts breached by Petitioners. A copy of the unreported Michigan Court of Appeals opinion is reproduced at pages 26-28 of the Petition. Subsequent applications by Petitioners for rehearing in the Michigan Court of Appeals and for leave to appeal to the Michigan Supreme Court were denied.

Dissatisfied with the Michigan Court of Appeals remand order, Petitioners instituted this suit for declaratory judgment and injunctive relief under the Civil Rights Act, 42 USC § 1983. Petitioners requested the convening of a three-judge court pursuant to 28 USC § 2283, for injunctive relief against enforcement of the Michigan Court of Appeals remand order and for a declaratory judgment that the Michigan statutes and court rules authorizing such remands are unconstitutional as applied to Plaintiffs. Defendants filed a motion to dismiss for failure to state a claim upon which relief could be granted and the case was subsequently dismissed in light of the District Court's decision that no substantial federal question was presented. On appeal, the United States Court of Appeals for the Sixth Circuit affirmed the District Court's judgment of dismissal. Copies of these opinions and orders are reproduced at pages 18-25 of the Petition.

ARGUMENT

THE DECISION OF THE COURTS BELOW WAS CLEARLY CORRECT AND THIS CASE PRESENTS NO IMPORTANT QUESTIONS OF FEDERAL LAW WHICH MUST BE SETTLED BY THIS COURT.

I.

THE DISMISSAL OF PETITIONERS' CIVIL RIGHTS ACTION WAS CORRECT BECAUSE THE COMPLAINT RAISED NO SUBSTANTIAL FEDERAL QUESTIONS.

Federal jurisdiction in civil rights actions must be predicated upon the presentation of substantial federal questions, the existence of which must be demonstrated by the complaint. *Ex parte Poresky*, 290 US 30, 31-32 (1933). In the instant case no substantial federal question exists because the claim asserted by Petitioners is obviously without merit and its unsoundness is clearly demonstrated by previous decisions of this Court on the subject. *Ex parte Poresky, supra; Bailey* v *Patterson*, 369 US 31 (1962).

Petitioners' assertion that this case presents substantial questions of constitutionality is clearly without merit. Their mistaken belief results from a misapprehension of the effect of the Michigan Court of Appeals opinion. The issue raised on appeal in the Michigan state courts dealt with Petitioners' liability for damages due to its breach of the contract. The Court of Appeals opinion on this issue affirmed the trial court's judgment against Petitioners. The only aspect of the appeal in which they can be said to have been successful was the determination that the acts disclosed by the record did not support an award for future damages in the amount of $75,000. The Court of Appeals opinion affirmed Petition-

ers' liability for damages and remanded the case to the trial court merely for further proofs, if any, on the issue of damages. The remand order did not determine any rights of the parties (i.e., it was not "an issue" of the case); it merely determined the forum for subsequent proceedings, if any, after the substantive issue (affirmance of liability) had been decided.

In addition to the patent lack of merit in the Petitioners' claim, the decision below is not in conflict with decisions of this Court and, in fact, previous decisions of this Court and the Michigan Supreme Court have foreclosed the question of whether an appellate court may remand a case to a trial court for computation of damages. As long ago as 1915 this Court held that in a proper case a state appellate court could constitutionally grant a partial new trial limited to the amount of damages only. *Norfolk Southern Railroad Co* v *Ferebee*, 238 US 269 (1915); *Gasoline Products Co* v *Champlin Refining Co*, 283 US 494 (1931). See also Annotation: "New Trial on Questions of Damages Only," 75 L Ed 1191, 1192 (1931) where numerous cases from many jurisdictions are cited in support of the statement that the rule is "well-established that in a proper case, an appellate court had power at common law, or when expressly authorized by statute, upon reversing a case, to award a new trial upon the question of damages only." In *Devine* v *Patteson*, 242 F2d 828 (CA 6, 1957) *cert den* 355 US 821 (1957) a malicious prosecution action in which the plaintiff appealed on the basis of insufficiency of the evidence, the Court held that the issue of liability was distinct from the issue of damages so that a new trial solely on the question of damages was ordered.

Similarly, Michigan appellate courts have long recognized the principle that an appellate court has the power to remand a case back to a trial court for a determination solely on the issue of damages. In *Rich* v *Daily Creamery Co*, 296

Mich 270 (1941), an action for breach of contract, a jury verdict in favor of plaintiffs was reached and damages were assessed. On a motion for new trial, the Court evidently concluded that the instructions to the jury had not charged definitely enough on the question of damages, leaving too much to the jury's speculation and the trial court ordered a remittitur or new trial. Defendants appealed claiming that the Court's remittitur arrived at a verdict by pure speculation. The Michigan Supreme Court agreed and granted a new trial "for the assessment of damages only, under the rules of law applicable to the measurement of damages sustained by plaintiff for the wrongs complained of and established by him in this action." 296 Mich at 288. After further proceedings in the trial court the case was again appealed to the Michigan Supreme Court which affirmed, *inter alia*, the earlier order remanding solely on the issue of damages. *Rich* v *Daily Creamery Co*, 303 Mich 344 (1942). *Rich* has been cited with approval in subsequent decisions by the Michigan Supreme Court. See, e.g., *Sullivan* v *Ulrich*, 326 Mich 218 (1949). Additionally, the remand procedure utilized in the instant case by the Michigan Court of Appeals is sanctioned not only by case law but also by statute, MCLA 600.310; MSA 27A.310, and court rule, GCR 1963, 810(1).

The overwhelming majority of jurisdictions support the proposition that in a proper case an appellate court may grant a remand or new trial solely on the issue of damages, totally apart from questions of liability. See, e.g., Annotation: "Propriety of Limiting to Issue of Damages Alone New Trial Granted on the Ground of Inadequacy of Damages Awarded," 29 ALR2d 1199 (1953). It is apparent that Plaintiffs' assertions as to the propriety of the Michigan Court of Appeals remand order are clearly without merit and the unsoundness of their position is so clearly demonstrated from previous decisions as to foreclose the subject. Thus, no substantial question of constitutionality is presented and

there is no need for a three-judge court. *Ex parte Poresky, supra.*

II.

THE REMAND ORDER OF THE MICHIGAN COURT OF APPEALS DID NOT DEPRIVE PETITIONERS OF DUE PROCESS OF LAW.

Petitioners argue that their right to due process of law was somehow violated because they claim they were not afforded prior notice and opportunity to be heard before the Michigan Court of Appeals entered its order remanding the case to the trial court for further proofs on the issue of damages. They assert injury because notice and hearing could have produced a different result (i.e., the remand order would never have been issued) and state that damages are "inevitable" upon the remand. The lack of merit in these allegations is readily apparent from the fact that the form and substance of the remand order was in compliance with well-established Michigan law and that damages are "inevitable" on remand only if Petitioners fail to present adequate proofs at any subsequent evidentiary proceeding.

By statute, the Michigan Court of Appeals has authority "to issue any writs, directives and mandates that it judges necessary and expedient to effectuate its determination of cases brought before it." MCLA 600.310; MSA 27A.310. Furthermore the Michigan General Court Rules specifically provide that when reviewing a judgment involving an issue tried without a jury, "such judgment may be affirmed or reversed, the cause remanded with directions, or a new trial ordered." GCR 1963, 810(1). The existence of the statutes and court rules and the line of cases which includes *Rich* v *Daily Creamery Co,* 296 Mich 270 (1941) must be deemed sufficient to place Petitioner on notice of the possibility of a remand order such as the one which was entered

by the Michigan Court of Appeals. Petitioners thus had the opportunity to present argument on the propriety of a remand order, but did not do so. Petitioners' position, if followed to its logical extreme, would require a holding that if error is found in a trial, a state appellate court is constitutionally powerless to order any corrective procedures in the trial court unless the merits of each of those procedures have been specifically argued on that appeal. Under Petitioners' point of view the only appellate remedy available would be an absolute reversal of an erroneous trial court judgment. The constitutionality of every appellate proceeding could apparently only be saved if all parties fully brief and argue the merits of each and every remedy historically available to an appellate court for the disposition of cases brought before it. The absurdity of this position is self-evident.

Petitioner admits on page 9 of the Petition that the remand order "in and of itself does not deprive Petitioners of property." In fact, the decision of the Michigan Court of Appeals has resulted in a windfall of $75,000 to the Petitioners. Thus there has been no demonstrable injury or deprivation of property as a result of the remand order. Petitioners' obvious fear, of course, is that after all the proofs have been presented in a subsequent state court proceeding, they will be found liable for a substantial amount of damages. Such fears, however well founded, do not constitute a deprivation of due process of law.

Even if it were held that Petitioners' due process rights were somehow violated by the Michigan appellate procedures, it does not necessarily follow that the proper remedy was prior notice and hearing before issuance of the remand order. As this Court said in *Goldberg* v *Kelley,* 397 US 254, 263 (1970):

> ". . . Consideration of what procedures due process may require under any given set of circumstances must

begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."

In the instant case the governmental interest involved is the efficient functioning of the state court system. Whatever interest Petitioners may have in obtaining prior notice and hearing before a Michigan appellate court can issue a procedural remand order is clearly out-weighed by the government interest in maintaining the orderly and time-honored procedures of its appellate courts. Because Petitioners have not been injured, because they had notice of the possibility of the issuance of the remand order, and because opportunity for a hearing will be presented to them at any future state court proceedings, the decision of the courts below that they had not been denied due process of law is correct.

III.

THE COURTS BELOW CORRECTLY CONCLUDED THAT THE RESPONDENTS ARE PROTECTED BY THE DOCTRINE OF JUDICIAL IMMUNITY.

In *Pierson* v *Ray*, 386 US 547 (1967) this Court held that judges were immune from liability for damages in civil rights actions. Additionally it has been held that his immunity also extends to declaratory and injunctive actions brought under the Civil Rights Act. *Littleton* v *Fisher*, 530 F2d 691 (CA 6, 1976). Because the actions complained of were undertaken by Respondents in the performance of their judicial activities, the Courts below correctly concluded that this suit against judges and court officials acting under color of judicial authority is barred by the doctrine of judicial immunity.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Robert A. Derengoski
Solicitor General

Thomas L. Casey
Assistant Attorney General

Business Address:
525 West Ottawa Street
761 Law Building
Lansing, Michigan 48913
(517) 373-1124

Dated: July 8, 1977